# "Out the Window"? Prospects for the EPA and FMLA after *Kimel v. Florida Board of Regents*

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*This note considers how the heightened scrutiny standard that the Court has used in gender cases under the Fourteenth Amendment will impact the congruence and proportionality test that the Court has applied in a recent series of cases examining congressional power under Section 5 of the Fourteenth Amendment. The purpose of this note is twofold. First it closely analyzes* Kimel v. Florida Board of Regents, *the Court's most recent decision concerning Section 5 and argues that the Court's analysis in Kimel indicates that a statute that involves heightened scrutiny has a much greater possibility of meeting the standards the Court has developed under the test. Second, it examines the Equal Pay Act (EPA) as a clear-cut example of a statute that should pass the test because of heightened scrutiny. Finally, this note argues that, despite its facial neutrality, the Family and Medical Leave Act (FMLA) also implicates heightened scrutiny and should therefore pass the test as well. This note explains both why heightened scrutiny applies to the FMLA and the reasons the FMLA should be considered a valid exercise of the Section 5 power.*

## I. INTRODUCTION

The Supreme Court recently took the next logical step in a trend that one commentator has predicted will eventually send all civil rights statutes "out the window."[1] In *Kimel v. Florida Board of Regents*,[2] the Court ruled that Congress lacked the authority under Section 5 of the Fourteenth Amendment[3] to abrogate state sovereignty under the Eleventh Amendment when it amended the Age Discrimination in Employment Act (ADEA) to apply to the States.[4] Although this decision is consistent with a recent trend in the Court's interpretation of Section 5,

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[1] *See* Interview with Professor Leon Friedman, *Morning Edition* (National Public Radio broadcast, June 24, 1999) (predicting that the Supreme Court's federalism decisions will mean that civil rights statutes are "out the window"). I was alerted to this reference in Professor Ruth Colker's article, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 656 n. 14 (2000) (discussing the Supreme Court's Section 5 decisions).

[2] 120 S. Ct. 631 (2000).

[3] Section 5 states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[4] *Kimel*, 120 S. Ct. at 650 (holding that the ADEA is not a valid exercise of the Section 5 power).

this is the first time it has struck down portions of a civil rights statute in the employment context.[5]

*Kimel* refined the elements of the "congruence and proportionality" test that the Court has applied in several recent cases[6] for determining the scope of congressional power under Section 5 and opened up the possibility that the Court may use this test to overturn other civil rights statutes.[7] Although *Kimel* was the first time the Court has struck down a civil rights statute, it is potentially important that the ADEA involved a class that the Court has consistently held is subject only to the lowest form of review under the Fourteenth Amendment rational basis scrutiny.[8] The Court has not yet considered a statute that involves a higher level of scrutiny or how that higher level will impact its analysis under the congruence and proportionality test.

This note considers how the heightened scrutiny standard that the Court has applied in gender cases will impact the congruence and proportionality test. The purpose of this note is twofold. First, it closely analyzes *Kimel,* the Court's most recent decision concerning Section 5, and argues that the Court's analysis in *Kimel* indicates that a statute which involves heightened scrutiny has a much greater possibility of meeting the standards the Court has developed under the test. Second, it examines the Equal Pay Act (EPA) as a clear-cut example of a statute that should pass the test because of heightened scrutiny and then argues that, despite its facial neutrality, the Family and Medical Leave Act (FMLA) also implicates heightened scrutiny and should therefore pass the test as well.

Most lower courts that have considered the FMLA have determined it is not valid under Section 5; however, these courts have failed to take into account the

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[5] *See* Colker, *supra* note 1 at 657 (stating that *Kimel* "is the first decision to conclude that Congress exceeded its authority to enact legislation in the civil rights area").

[6] *See, e.g., Kimel,* 120 S. Ct. at 650 (holding that the ADEA exceeded Congress's power under Section 5); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress did not have the power under Section 5 to enact the Religious Freedom Restoration Act of 1993); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (finding that the Patent and Plant Variety Protection and Clarification Act was not within the Section 5 power); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (concluding that the Trademark Remedy Clarification Act did not validly abrogate state sovereign immunity); Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (holding that "[t]he Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court").

[7] For example, the Court will address the validity of the Americans with Disabilities Act (ADA) under Section 5 in Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999). The *Garrett* decision also deals with one provision of the FMLA under Section 5, but the Court did not grant certiorari on the FMLA issue in the case. *See infra* Part V.C.2 (discussing *Garrett*'s analysis of the FMLA).

[8] *See Kimel,* 120 S. Ct. at 646 (noting that age is not a suspect classification).

effect that heightened scrutiny has on the congruence and proportionality test.[9] The Court has consistently stated that Congress has the power to reach both unconstitutional and constitutional conduct by the states when exercising its powers under Section 5.[10] This indicates that the Court is willing to take a more complex and nuanced approach to congressional exercise of Section 5 than many lower courts have. The FMLA is an excellent test case of this complexity because it challenges the limits of the Court's approach in unique ways. This note explains why heightened scrutiny applies to the FMLA and the reasons the FMLA should be considered a valid exercise of the Section 5 power.

Part II describes the Supreme Court's expansion of state sovereignty under the Eleventh Amendment, particularly the development of the congruence and proportionality test. Part III analyzes the Court's reasoning in *Kimel* to determine how the test was applied to the ADEA and summarizes the standards that apply after *Kimel*. Part IV applies these standards to the EPA and concludes that because heightened scrutiny applies to gender, the EPA is clearly remedial legislation that is sufficiently circumscribed under the test. Part V considers the difficulties that the FMLA faces under these standards and develops a theory based on *United States v. Virginia*[11] that heightened scrutiny should apply and concludes that under the Court's accommodation requirement established in *Virginia*, the FMLA is a valid exercise of the Section 5 power.

## II. THE SUPREME COURT'S EXPANSION OF ELEVENTH AMENDMENT PROTECTION

The Supreme Court's recent decisions concerning the Eleventh Amendment have shown a clear trend towards increasing state sovereignty and limiting congressional power to subject states to suits from private individuals. This trend

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[9] *See, e.g.*, Sims v. Univ. of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000) (holding that the FMLA is an improper exercise of congressional power under Section 5); Hale v. Mann, 219 F.3d 61, 68 (2d Cir. 2000) (holding that leave for personal illness under FMLA is invalid); Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 408–409 (M.D. Pa. 1999) (holding that the FMLA's imposition of "substantive employment conditions" exceeded Congress's enforcement powers under Section 5); Driesse v. Fla. Bd. of Regents, 26 F. Supp. 2d 1328, 1332–34 (M.D. Fla. 1998) (holding that Congress did not use language clearly expressing intent to abrogate state immunity under the FMLA and that the FMLA exceeded Congress's enforcement powers under Section 5); McGregor v. Goord, 18 F. Supp. 2d 204, 209 (N.D.N.Y. 1998) (holding that the FMLA was not a valid exercise of Congress's Section 5 powers under the Fourteenth Amendment); Thomson v. Ohio State Univ. Hosp., 5 F. Supp. 2d 574, 581 (S.D. Ohio 1998) (holding that the FMLA exceeded Congress's enforcement powers under Section 5).

[10] *See, e.g., City of Boerne*, 521 U.S. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)) (stating that Congress can reach constitutional conduct by the states with legislation under Section 5).

[11] 518 U.S. 515 (1996).

began with the Court's decision in *Seminole Tribe v. Florida*,[12] where a five-member majority held that the state of Florida was entitled to immunity from a Native American tribe's suit alleging that the state had violated the federal Indian Gaming Regulatory Act.[13]

## A. *The* Seminole Tribe *Standard*

*Seminole Tribe* was significant for two reasons. First, it overruled the Court's decision in *Pennsylvania v. Union Gas*[14] upholding Congress's ability to abrogate state sovereign immunity through its powers under the Commerce Clause.[15] Second, the Court articulated the standard that it will apply in determining whether Congress has abrogated the states' sovereign immunity.[16] The Court said that it asks two questions to make this determination: (1) "whether Congress has unequivocally expresse[d] its intent to abrogate immunity";[17] and (2) "whether Congress has acted pursuant to a valid exercise of power."[18]

By overturning *Union Gas*, *Seminole Tribe* signaled a new approach to the Eleventh Amendment and limited the potential avenues for congressional abrogation of the states' sovereign immunity. After *Seminole Tribe*, commentators speculated that two primary possibilities remained open to Congress for abrogating sovereign immunity: (1) injunctive relief through suits directly against state officials recognized by the Court in *Ex Parte Young*;[19] and (2) abrogation under Section 5 under *Fitzpatrick v. Bitzer*.[20]

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[12] 517 U.S. 44 (1996).

[13] *Id.* at 47 (holding that the Indian Commerce Clause, U.S. CONST. Art. I., § 8, cl. 3, does not grant jurisdiction over a state that has not consented to be sued).

[14] 491 U.S. 1 (1989). The *Union Gas* decision is discussed in detail in Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 S. CT. REV. 1, 14–17 (1996).

[15] U.S. CONST. art. I., § 8 ("The Congress shall have the power... [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.").

[16] *Seminole Tribe*, 517 U.S. at 55.

[17] *Id.* (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

[18] *Id.* (citing *Green*, 474 U.S. at 68).

[19] 209 U.S. 123, 155–56 (1908). Under *Ex Parte Young*, an individual can avoid the problem by suing a sovereign state officer instead of the state itself. *See id.* (stating that "officers of the state... may be enjoined by a Federal court of equity from such [unconstitutional] action"). The individual is, however, limited to injunctive relief and cannot sue for money damages. *See, e.g.*, Lauren Ouziel, *Waiving States' Sovereign Immunity from Suit in Their Own Courts: Purchased Waiver and the Clear Statement Rule*, 99 COLUM. L. REV. 1584, 1588–89 (1999) (explaining that "*Young* and its progeny... are a limited recourse available only to litigants seeking prospective relief"). For an interesting analysis of the apparent contradiction between *Seminole Tribe*'s curtailing of congressional power to abrogate sovereign immunity and the Court's continued recognition of the *Ex Parte Young* "exception" see Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in* Seminole Tribe, 52 VAND. L. REV. 407, 424–39 (1999).

However, in its next term, the Court limited Congress's power to abrogate via Section 5 in *City of Boerne v. Flores*,[21] where it held that Congress exceeded its power in enacting the Religious Freedom Restoration Act of 1993 (RFRA).[22] Congress passed the RFRA in response to the Court's ruling in an earlier case, *Employment Division v. Smith*,[23] that a state does not have to show a compelling interest to justify laws that incidentally burden the free exercise of religion.[24] The RFRA directly overturned this decision by requiring state and local governments to show a compelling interest under these circumstances.[25]

*Boerne* held that Congress's power under Section 5 is primarily "remedial" and that the RFRA exceeded this power when it attempted to legislatively change the standard of review. The Court said that the RFRA's requirements went well beyond the remedial power of Section 5 and noted that "[t]he design of the Amendment and the text of section 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[26] This was a clarification of the second prong of the standard articulated in *Seminole Tribe* and represented a further narrowing of what powers the Court will consider a valid exercise under it.[27]

## B. *The Congruence and Proportionality Test*

*Boerne* is also important because the Court for the first time fully articulated the congruence and proportionality test that it has continued to apply in recent Section 5 cases.[28] The Court said that "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved."[29] The Court then examined two aspects of the

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[20] 427 U.S. 445 (1976). For a discussion of this narrowing trend see Leading Cases, 113 HARV. L. REV. 200, 223 (1999) (citing Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1291 (1997)). *See generally*, Colker, *supra* note 1 at 7.

[21] 521 U.S. 507 (1997).

[22] *Id.* at 536 (holding that the RFRA is "beyond congressional authority").

[23] 494 U.S. 872 (1990).

[24] *Id.* at 884–885.

[25] *See* 42 U.S.C. § 2000bb(a)(4) (1994) (announcing in its Congressional findings that "in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"); *see also Boerne*, 521 U.S. at 515 (quoting 42 U.S.C. § 2000bb).

[26] *Boerne*, 521 U.S. at 519.

[27] The second prong of the *Seminole Tribe* test examines whether Congress acted "pursuant to a valid exercise of power." *See supra* note 16 and accompanying text.

[28] *See supra* note 6.

[29] *Boerne*, 521 U.S. at 530 (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

RFRA to determine if it passed the test. First, the Court examined the legislative record of the RFRA and found that Congress had failed to identify any unconstitutional behavior by the states and instead "the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion."[30]

Second, the Court focused on the disproportionality of the RFRA to any potential constitutional violations by the states.[31] This proportionality analysis contained three distinct strains. First, the Court discussed the "reach and scope" of the RFRA's provisions and determined that its "[s]weeping coverage ensures intrusion at every level of government."[32] Next, the Court identified the possible unconstitutional conduct that the RFRA was designed to prevent and said that "[t]he substantial costs RFRA exacts . . . far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith."[33] Finally, the Court noted that the RFRA attempted to change the legal standard that the Court applies.[34] All three of these aspects contributed to the Court's holding that the Act exceeded Congress's remedial powers under Section 5.[35]

For both sides of this analysis, the Court cited to *South Carolina v. Katzenbach* as a comparison of a problem where Congress had the power to subject the states to money-damages suits from private parties.[36] With respect to the legislative history of RFRA, the Court said that "[i]n contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."[37] Concerning the scope of the legislation, the Court noted that "[i]n *South Carolina v. Katzenbach,* the challenged provisions were confined to those regions of the country where voting *discrimination* had been most flagrant . . . and affected a discrete class of state laws, *i.e.,* state voting laws."[38] Although the Court did not rely on the lack of

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[30] *Id.*

[31] *See id.* at 532–36 (discussing the extensive "reach and scope" of the RFRA).

[32] *Id.* at 532.

[33] *Id.* at 534.

[34] *See id.* at 535 ("In addition, the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-Smith jurisprudence RFRA purported to codify—which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.").

[35] *Id.* at 536.

[36] 383 U.S. 301 (1966). *Katzenbach* dealt with congressional power under Section 2 of the Fifteenth Amendment which contains language similar to Section 5: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

[37] *Boerne,* 521 U.S. at 530.

[38] *Id.* at 532–33 (citing *Katzenbach,* 383 U.S. at 315). The Court was careful to qualify this comparison later noting that "[t]his is not to say, of course, that § 5 legislation requires

limitations in the RFRA for its decision, this is a clear indication that it is willing to consider the scope of a statute's measures in assessing the proportionality aspect of the congruence and proportionality test.

### C. *Application of the Test in Other Cases*

The Court recently applied the congruence and proportionality test again in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[39] The Court in *College Savings Bank* held that Congress was unable to abrogate state immunity from patent infringement suits under Section 5. The Court's application of the test was straightforward because it determined that the Trademark Remedy Clarification Act did not address any property interest protected by the Due Process Clause of the Fourteenth Amendment.[40] This precluded the need for determining whether the scope of the law was in proportion to the problem identified by Congress because there was no constitutional right that the law could possibly be enforcing.[41]

The Court further narrowed the scope of the Section 5 power in the companion case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[42] where it held that Congress exceeded its authority when it subjected states to claims for patent infringement. The Court focused particular attention on the legislative history of the statute and found that Congress had "enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution."[43] The Court

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termination dates, geographic restrictions, or egregious predicates." *Boerne*, 521 U.S. at 533. However, the Court emphasized that "limitations of this kind tend to ensure Congress's means are appropriate to ends legitimate under § 5." *Id.*

[39] 527 U.S. 666 (1999).

[40] *See id.* at 675 ("Finding that there is no deprivation of property at issue here, we need not pursue the follow-on question that *City of Boerne* would otherwise require us to resolve . . .").

[41] *See id. College Savings Bank* illustrates another aspect of the Court's interpretation of the "remedial" requirement of Section 5. In order to be remedial, the law must initially be aimed at some relatively direct violation of the Fourteenth Amendment. 527 U.S. 627, 638–39, 119 S. Ct. 2199, 2206 (1999). In *College Savings Bank*, the law purported to protect property rights; however, the Court determined that the actions that it prohibited did not meet the constitutional definition and therefore that the law was necessarily not remedial. *Id.* By contrast, in *Boerne*, there was no difficulty with the right that the law aimed to protect. Free exercise of religion is clearly a liberty interest. Rather, the law was not "remedial" in the first instance because Congress was attempting to effect a "substantive" change in the nature of the right protected by legislatively dictating the level of scrutiny the Court had indicated it would apply. Furthermore, the scope of its protection was well out of proportion to the potential unconstitutional conduct that it was designed to address.

[42] 527 U.S. 627 (1999).

[43] *Id.* at 645–46 (referring to the Patent and Plant Variety Protection and Clarification Act).

determined that, due to this lack in the legislative record, the statute was out of proportion to any remedial or preventive objective.[44]

This is the first time that the Court relied heavily on the legislative record to invalidate an act, and its treatment of the legislative record sets a high bar for what must be included in order for Congress to exercise its enforcement power under Section 5. Of particular note is the Court's rejection of statements in the record indicating that Congress intended to prevent possible unconstitutional conduct by passing the Act. The Court dismissed testimony indicating concern over potential future unconstitutional activity, saying, "At most, Congress heard testimony that patent infringement by States might increase in the future . . . and acted to head off this speculative harm."[45] This makes it clear that the preventive aspect of the Section 5 power cannot be exercised unless congressional fears are grounded in an existing trend of unconstitutional conduct by the states.[46]

The Court's focus on the existence of state remedies for patent infringement is also worth noting because it presages an aspect of the analysis that the Court developed more fully in its most recent case, *Kimel v. Florida Board of Regents*.[47] The Court in *Florida Prepaid* determined that although patents were clearly "property" and therefore protected by the Due Process Clause, a state's infringement on the patent does not necessarily violate due process: "Instead, only where the State provides no remedy, or only inadequate remedies . . . could a deprivation of property without due process result."[48] The Court then took Congress to task for only "barely consider[ing] the availability of state remedies."[49] It dismissed the testimony that Congress did consider concerning state remedies as revealing "not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies."[50] The Court therefore determined that the statute failed to address potentially unconstitutional conduct because there is no due process problem where a state

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[44] *See id.* at 646 (noting that the provisions of the statute are out of proportion to the problem).

[45] *Id.* at 641 (citing House Hearings 22 (statement of Jeffrey Samuels); *id.* at 36–37 (statement of Robert Merges); *id.* at 57 (statement of William Thompson).

[46] *See* James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities under the Americans with Disabilities Act after* Seminole Tribe *and* Flores, 41 ARIZ. L. REV. 651, 682 (1999). Leonard notes that "a failure to establish remedial needs in the legislative history may well augur against a finding that Congress has acted within Section 5, but is probably not determinative." *Kimel* appears to make the legislative history analysis a potentially more important element than Leonard suggests because the Court continued with this analysis despite having determined that the ADEA could reach very little potential unconstitutional conduct. *See infra* Part III.A (discussing use of legislative history in *Kimel*).

[47] 528 U.S. 62 (2000).

[48] *Florida Prepaid*, 527 U.S. at 643.

[49] *Id.*

[50] *Id.* at 644.

remedy exists. Although in this case the Court was defining the due process standard, this consideration of existing state law implies that the Court may constrain Congress's power to act in situations where the states have already passed protective legislation. This is a potentially significant limitation on the Section 5 power.

## III. CONGRUENCE AND PROPORTIONALITY IN *KIMEL*

In *Kimel v. Florida Board of Regents*,[51] the Court continued this trend of expanding state sovereignty under the Eleventh Amendment and held that, although Congress made its intention to abrogate the states' immunity in the ADEA sufficiently clear, it lacked the power under Section 5 to do so.[52] The Court once again applied the congruence and proportionality test and found that, because age classifications are only entitled to rational basis scrutiny, the ADEA standard was out of proportion to the potential constitutional violations it was designed to eliminate.[53]

This time the Court focused its attention primarily on the legislative history of the ADEA and determined that Congress did not identify a serious problem in state and local government sufficient to warrant the protections provided by the ADEA. In addition, the Court took note of existing state laws prohibiting age discrimination, an aspect it had only considered previously in connection with the constitutional standard in *Florida Prepaid*.[54]

### A. *The Use of Legislative History in* Kimel

The Court's use of legislative history in *Kimel* is noteworthy because it alters the analysis that was conducted in *Boerne* and *Florida Prepaid*. Unlike *Boerne*, where the Court identified the substantive change in the legal standard as the "most serious" problem,[55] in *Kimel* it primarily relied on the lack of a strong legislative record to invalidate the ADEA.[56] This indicates a shift in the Court's use of legislative history under the congruence and proportionality test. While it conducted a similar examination in earlier cases, the Court did not rely on legislative history to invalidate the RFRA or the Patent Remedy Act and intimated that it is not the role of the Court to question the basis on which

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[51] 528 U.S. 62 (2000).

[52] *See id.* at 645 (concluding that the ADEA is not appropriate legislation under Section 5).

[53] *See id.* (noting that the ADEA requirements are disproportionate).

[54] *See supra* notes 42–45 and accompanying text (discussing *Florida Prepaid*).

[55] City of Boerne v. Flores, 521 U.S. 507, 531 (1997).

[56] *See infra* Part III.A.1 (discussing the use of legislative history in *Kimel*).

Congress makes its decisions, only whether Congress has the power to do so.[57] A comparison of the differences between the use of legislative history in each case reveals the nature of this shift.

### 1. *Comparison with Legislative History in* Boerne

In *Boerne,* the Court examined the legislative record and determined that it "lacks examples of modern instances of generally applicable laws passed because of religious bigotry."[58] The Court noted further that this "absence of more recent episodes stems from the fact that, as one witness testified, 'deliberate persecution is not the usual problem in this country.'"[59] The Court also characterized Congress's main concern with respect to zoning regulations as primarily "with the incidental burdens imposed, not the object or purpose of the legislation."[60] In *Florid Prepaid,* the Court shifted its focus more directly on the gaps in the legislative record; however, it still focused on the lack of explicit references to state remedies rather than questioning the basis of statements made in the record.

While thorough and searching, these examinations accepted the evidence compiled by Congress at face value and did not look behind it to weigh its relative strength and reliability. The Court simply found that the evidence was insufficient to justify the scope of the statutes. More importantly, the Court indicated that even an examination this searching is unnecessary to the determination whether Congress acted within its Section 5 power. In *Boerne,* the Court explained:

> This lack of support in the legislative record, however, is not the RFRA's most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but on "due regard for the decision of the body

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[57] *See Boerne,* 521 U.S. at 531–32:

> Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.' As a general matter, it is for Congress to determine the method by which it will reach a decision.

*Id.* (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970)). *See also* Note, *Section 5 and the Protection of Nonsuspect Classes after* City of Boerne v. Flores, 111 HARV. L. REV. 1542, 1549–1550 (1998). The author argues that *Boerne* indicates the courts will not take a close look at legislative findings under the congruence and proportionality test. *Kimel*'s use of legislative history proves this prediction incorrect. *See infra.* notes 62–68 and accompanying text. *See also* Leonard, *supra* note 46 at 682–83. Leonard also predicted that the legislative history analysis would not be dispositive after *Boerne.*

[58] *Boerne,* 521 U.S. at 530.

[59] *Id.* (quoting House Hearings 334 (statement of Douglas Laycock) and citing House Report 2).

[60] *Boerne,* 521 U.S. at 531 (citing House Report 2; Senate Report 4–5; House Hearings 64 (statement of Nadine Strossen)); *id.* at 117–18 (statement of Rep. Stephen Solarz); 1990 House Hearing 14 (statement of Rep. Stephen Solarz) (citations omitted).

> constitutionally appointed to decide." . . . As a general matter, it is for Congress to determine the method by which it will reach a decision.[61]

The Court's examination of the ADEA's legislative record is in striking contrast to this broad statement of deference. In *Kimel,* the Court not only thoroughly examined the record, it took issue with the substantive content on which Congress based its determinations. The Court first noted that the evidence relied on "consists almost entirely of isolated sentences clipped from floor debates and legislative reports."[62] This is similar to the dismissal of the RFRA's record as "anecdotal evidence."[63] However, in *Kimel* the Court went on to question the validity of specific assertions made by individual members of Congress concerning the extent of age discrimination in state and local government.[64]

The most prominent example is the Court's treatment of a statement by Senator Lloyd Bentsen. Rather than accepting his statement that "there is ample evidence that age discrimination is broadly practiced in government employment" at face value, the Court examined the content of the newspaper articles that Senator Bentsen relied on and dismissed his assessment by noting that the articles were "about federal employees."[65]

The Court then took issue with Congress's reliance on a 1966 report prepared by the state of California detailing age discrimination in its public agencies. It first concluded that the report failed to indicate that the state had engaged in unconstitutional age discrimination because "the majority of age limits uncovered in the state survey applied in the law enforcement and firefighting occupations" that are valid even under the ADEA.[66] The Court then said that "[e]ven if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress's 1974 extension of the ADEA to every State of the Union."[67]

Finally, the Court rejected the argument that Congress could extrapolate from the existence of a widespread problem in the private sector to find that a similar problem existed with respect to the states. It said that this argument is "beside the point" and that "it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States."[68]

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[61] *Boerne,* at 531–32 (quoting Oregon v. Mitchell, 400 U.S. at 207 (opinion of Harlan, J.)).

[62] *Kimel,* 120 S. Ct. at 649.

[63] *Boerne,* 521 U.S. at 531.

[64] *See infra* notes 65–67 and accompanying text.

[65] *Kimel,* 120 S. Ct. at 649.

[66] *Id.*

[67] *Id.*

[68] *Id.* This aspect of the Court's examination of the legislative history is potentially significant for the EPA because its legislative history is similarly lacking in specific instances of

This critical examination of the legislative record represents a significant change from the Court's approach in *Boerne* and *Florida Prepaid.* In those cases, the Court simply accepted the actual findings and statements made in the record and found them inadequate.[69] By contrast, in *Kimel* the Court conducted its own independent evaluation of direct assertions by members of Congress and the sources on which they relied to determine if in fact the assertions were justified.

Although not explicit, this is clearly a repudiation of the apparent deference that the Court expressed in *Boerne* and indicates that, when conducting its analysis of the scope of the problem, the Court will look very closely at not only what Congress purports to have found, but at the actual bases of its findings as well.

### 2. *Further Narrowing of the Section 5 Power*

Furthermore, the Court's refusal to even consider the argument that Congress could have relied on statistics showing widespread discrimination in the private sector and assumed that a similar pattern existed for state employees indicates a potential narrowing of the range of conduct that the Court will permit Congress to address under Section 5. In *Boerne,* the Court said that it would allow Congress to address conduct that was not in itself unconstitutional, so long as the legislation was aimed at deterring or preventing unconstitutional conduct: "[L]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[70]

*Kimel* reiterated that Congress's enforcement power "includes the authority both to remedy and deter violation of rights guaranteed [under the Fourteenth Amendment] by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[71] However, the Court carefully qualified this by emphasizing that the enforcement power does not permit Congress "to determine *what constitutes* a constitutional violation."[72]

The Court's insistence on a showing of specific documentation of unconstitutional conduct by state employers implies a further constriction of this potential flexibility, because it indicates that the Court will not permit Congress to

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unconstitutional conduct by the states. This potential hurdle for the EPA is discussed in detail infra Part IV.B.

[69] *See* City of Boerne v. Flores, 521 U.S. 507, 530–32 (1997) (discussing the legislative history of the RFRA); Fla. Prepaid Postsecondary Educ. Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639–47, (1999) (discussing the legislative history of the Patent Remedy Act).

[70] *Boerne,* 521 U.S. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[71] *Kimel,* 120 S. Ct. at 644.

[72] *Id.*

infer the existence of a problem and may not even permit Congress to anticipate the future emergence of one.[73]

The strict limitations the Court appears to place on Congress in *Kimel* begs the question of what sort of constitutional conduct Congress is empowered to reach when it passes legislation to deter or prevent unconstitutional conduct by the states, as well as the nature of the basis that the Court will require in order to permit Congress this flexibility. This flexibility falls well short of changing the legal standard that the Court has applied, but the Court has not yet indicated what might be valid. The analysis of the EPA and the FMLA below argues that, at least in the context of heightened scrutiny, the Court should be willing to allow Congress to reach constitutional conduct when exercising the Section 5 power.[74]

### B. *A Shift in the Proportionality Calculus*

On the other hand, the Court in *Boerne* appeared to suggest that Congress could not act at all in an area that did not involve strong constitutional rights. The Court stated that the more serious problem with the RFRA was its "substantive change in constitutional protections" and appeared to imply that a detailed legislative record could never justify this kind of statute.[75] In *Kimel,* the Court backed away from this by continuing with an examination of the legislative history despite an initial finding that the ADEA changed the substantive standard

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[73] There is a robust debate over the Court's current approach to limiting congressional power through principles of federalism. A recent example critiquing the Court's expansion of federalism protections is Frank B. Cross, *Realism About Federalism,* 74 N.Y.U. L. Rev. 1304 (1999). Cross observes that federalism advocates appear "to be congealing around . . . a highly subjective judicial balancing test with a strong procedural component that would require Congress to justify federal involvement when legislating." *See id.* at 1305. This appears to be an accurate description of the approach taken in *Kimel,* particularly the searching scrutiny of the legislative history that the Court engaged in. An example supportive of this approach is Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?,* 111 HARV. L. REV. 2181, 2253 (1998) (arguing that courts should have the power to review congressional action).

Although discussion of this debate is outside the scope of this note, it is interesting to note that most courts addressing the ADEA under the Court's Section 5 analysis prior to *Kimel* did not anticipate the further narrowing that *Kimel* represents. *See* Lisa M. Durham, *Protection from Age Discrimination for State Employees: Abrogation of Eleventh Amendment Sovereign Immunity in the Age Discrimination in Employment Act,* 33 GA. L. REV. 541, 596 (1999) (noting that federal circuit courts have "almost uniformly" held that the ADEA was a valid exercise of Section 5).

[74] *See infra* Parts V and VI.

[75] *Boerne,* 521 U.S. at 532. One commentator examining the Section 5 standard prior to *Kimel* also highlighted this language as indicating that "the issue of legislative history is subordinate to the issue of congressional authority." *See* Leonard, *supra* note 46 at 682.

for age-based classifications.[76] Thus, it appears that the more searching examination of legislative history may be a tradeoff. Rather than completely foreclosing the possibility of congressional action when Congress acts to protect classes that the Court has said are not entitled to heightened protection, the Court will take a close look at the basis on which Congress is acting to see if it has in fact identified potential constitutional violations.[77]

In other words, the two aspects of the congruence and proportionality test influence one another.[78] If Congress is acting to protect rights that are entitled to strong constitutional protection, the Court will recognize that the universe of potential constitutional violations is necessarily broader and will require correspondingly less in the legislative record indicating that those violations exist. On the other hand, when Congress is acting in an area where constitutional protections are less broad, the Court will look much more closely at the legislative

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[76] *See Kimel,* 120 S. Ct. at 645 (stating that "[i]nitially, the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act"). *See also* Colker, *supra* note 1 at 675. Colker argues that the Court's Section 5 jurisprudence has analyzed congressional power differently depending on whether the constitutional right involved was based on the Due Process Clause or the Equal Protection Clause. She notes that even though *Kimel* struck down the ADEA, it "drew that conclusion after taking Congress's powers more seriously than it has in recent cases involving the Due Process Clause" and therefore that *Kimel* indicates the Court will be more deferential to Congress when it acts to enforce the Equal Protection Clause. *Id.* at 675–76. This deference is manifested in part by the fact that the Court will look to the legislative record even after concluding that the law appears to change the substantive standard. *See id.* (arguing that "[i]t is impossible to say that any federal antidiscrimination legislative measure is not seeking to enforce the Fourteenth Amendment so long as Congress has created a legitimate record"). This view is consistent with the premise of this note that Congress has correspondingly more power to act when heightened scrutiny is implicated.

[77] Professor Leonard analyzed the Court's statements in *Boerne* concerning legislative history and determined that, combined with other statements that the judicial branch has the power to interpret the Constitution, "it would appear that no amount of fact finding by Congress could rescue an act of Congress that the Court considers substantive." Leonard, *supra* note 46 at 682. Furthermore, some lower courts in analyzing other statutes under the test have noted that examination of legislative history is not required. *See, e.g.,* Varner v. Ill. State Univ., 150 F.3d 706, 716 n.13 (7th Cir. 1998) (stating that legislative findings are helpful for the congruence and proportionality inquiry; "however, they are not required"), *cert. granted,* 68 U.S.L.W. 3458 (U.S. Jan. 18, 2000) (No. 98-1845) The Court's willingness to look at the legislative history in *Kimel* after determining that there was very little room for Congress to act at least appears to open up the possibility that sufficiently detailed fact finding concerning an existing problem of unconstitutional conduct could save a statute and perhaps even require such an examination.

[78] One commentator has referred to this as the "jelly donut" rule. In other words, the unconstitutional conduct is the core "jelly" and the conduct that Congress can reach is the outer donut. The more "jelly" in the middle, the bigger the donut can be. *See* Arlene B. Mayerson, Comments at the Ohio State Law Journal Symposium: *Facing the Challenges of the ADA: The First Ten Years and Beyond* (Apr. 7, 2000).

record to determine if Congress has in fact identified the existence of unconstitutional conduct by the states.[79]

### C. *Examination of Existing State Law*

A second difference in the approach of *Kimel* is the Court's consideration of state laws that provide relief for age discrimination. The Court noted that state employees are protected from age discrimination in "almost every State of the Union" and emphasized that "[t]hose avenues of relief remain available today, just as they were before this decision."[80] The Court did not explicitly rely on the existence of these protections in its analysis; however, these laws were highlighted in the briefs for the Florida Board of Regents.[81]

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[79] This analysis is also consistent with the approach that the Court took in early Section 5 and related cases. For example, the Court in *South Carolina v. Katzenbach* found the Voting Rights Act provisions prohibiting race discrimination to be a valid exercise of congressional power without a searching analysis of the legislative record in a situation where heightened scrutiny applied to the class of persons the law was designed to protect. *See Katzenbach,* 383 U.S. 301, 327.(1966). Similarly, *Katzenbach v. Morgan* held that the provisions of the Voting Rights Act prohibiting literacy tests as voting qualifications also were valid under Section 5. *See Morgan,* 384 U.S. 641, 646 (1966). Justice Harlan's dissent in *Morgan* explicitly pointed out that the legislative history of the Voting Rights Act does not contain examples of unconstitutional conduct. *See Morgan,* 384 U.S. at 669 (Harlan, J., dissenting).

*Katzenbach* did, however, discuss the well-documented historical evidence of unconstitutional conduct by the states. This opens up the possibility that, in addition to the formal legislative record, the Court may also consider general knowledge concerning abuses by the states when it considers the basis on which Congress has acted. *See Katzenbach,* 383 U.S. at 308 ("The constitutional propriety of the Voting Rights Act must be judged with reference to the historical experience which it reflects."). One commentator has suggested that this willingness to look outside the legislative record in the Voting Rights Acts cases illustrates a more liberal approach to Section 5 than *Boerne* where the Court scrutinized the legislative record fairly closely because *Katzenbach* and *Morgan* indicate a willingness by the Court to engage in speculation about possible bases on which Congress could have acted rather than requiring Congress to explain the basis in the legislative record. *See* Leonard, *supra* note 46 at 722–23 (saying that *Morgan* implies an assumption that Congress has a basis for exercising the Section 5 power).

[80] *Kimel,* 120 S. Ct. at 650.

[81] *See* Respondent's Brief at 37, Fla. Bd. of Regents v. Kimel, 120 S. Ct. 631 (2000) (Nos. 98-791, 98-796), *available at* 1999 WL 631661. The Florida Board of Regents used the existence of state laws to argue that not only did the ADEA fail to address existing constitutional violations, but also that it could not be justified as an attempt to prevent potential future violations. Their brief argued that "[n]o threat of future violations exists. . . . States all have laws or administrative provisions restricting age discrimination." *Id.* at 37. This is a more limited use of state laws in the Section 5 analysis than I present below because it only addresses one potential rationale that Congress could put forth for using the Section 5 power. As the discussion below indicates, the existence of state laws could play a more direct role in determining both whether Congress was justified in acting to address an existing problem as well as whether it could have been acting to prevent potential future violations.

The *Kimel* Court's consideration of these laws and the prominent position they occupied in the Florida Board of Regent's brief suggest that the Court may have been at least influenced in its analysis under the congruence and proportionality test by their existence. This raises the possibility that the Court could take into account the presence or absence of state laws in a later case.[82] Such an approach would be consistent with the Court's close examination of legislative history under the test because the congruence and proportionality test is primarily concerned with the actual extent of the problem, and the existence of state laws directed at the same issue is strong evidence that a problem exists.

There are two ways in which the existence of such laws could be incorporated into the test directly. On the one hand, the presence of state laws addressing the same kind of problem as the federal legislation is evidence that the states themselves were aware a problem existed that needed to be addressed. This approach has the advantage of permitting Congress to act concurrently with the states.

The other possible approach is to consider the existence of laws as evidence that a widespread problem that requires congressional intervention does not exist because state laws already effectively deal with the problem.[83] This analysis

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[82] At least one circuit has already considered the existence of state laws in applying the congruence and proportionality test. *See* Alsbrook v. City of Maumelle, 184 F.3d 999, 1009 (8th Cir. 1999). The Eighth Circuit applied the test to the ADA and found that the Act was not a valid exercise of the Section 5 power because it prohibited a broad range of potentially constitutional conduct. *See id.* at 1010. *Alsbrook* only briefly considered the legislative history of the ADA in its analysis. In doing so, however, it noted that "all states in this circuit have enacted comprehensive laws to combat discrimination against the disabled, many of them adopted prior to the effective date of the ADA." *Id.* at 1010. The context of this quotation indicates that *Alsbrook* took the approach of considering state laws that existed at the time the ADA was passed as evidence that the states were aware of the problem and already addressing it and thus precluding Congress from concluding that it was necessary to act.

[83] A variation of this approach is suggested by Professor Colker's distinction between statutes that protect rights under the Equal Protection Clause of the Fourteenth Amendment and those that protect rights under the Equal Protection Clause of the Fifteenth Amendment. *See* Colker, *supra* note 1, at 677–82, 701–02. Using that distinction, it is possible to argue that the existence of state laws should be taken into account only when Congress acts to protect rights under the Due Process Clause. The Court in *Florida Prepaid Postsecondary Education Board v. College Savings Bank*, 527 U.S. 627 (1999), appears to take this approach as it relied on the existence of state tort remedies for patent infringement in its determination that the statute could not have remedied constitutional violations by the states. *See id.* at 643. The Court stated that in procedural due process claims the deprivation of a constitutionally protected interest is not itself unconstitutional, rather "what is unconstitutional is the deprivation of such an interest without due process of law." *Id.* (citation omitted). The Court said that a state remedy for the deprivation of a constitutionally protected interest creates due process, and therefore, the existence of a state law makes the deprivation itself constitutional. *See id.* ("Only where the State provides no remedy . . . could a deprivation of property without due process result."). Under this analysis, congressional power under Section 5 can never be remedial under

would require comparison of the state laws in relation to the federal approach to determine whether the differences in coverage leave open space where Congress could have considered action necessary.[84]

Although the Court apparently considered contemporary laws in *Kimel,* it does not appear to have taken either of these approaches. Justice O'Connor noted that anti-discrimination laws exist "in almost every State of the Union";[85] however, despite their ubiquity, the Court concluded that the problem was not widespread enough to justify the ADEA.

On the other hand, the existence of these laws does not appear to have weighed against the need for the ADEA. The Court's reference to the laws simply emphasized that its decision would not foreclose all possible relief for state employees. Justice O'Connor noted that "[o]ur decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers."[86] This indicates that the Court did not consider the laws directly in its proportionality analysis.[87]

### D. *The Standard for Section 5 After* Kimel

The discussion above illustrates that the series of cases culminating with *Kimel* expanded and clarified the standards that the Court will use to determine whether Congress has acted pursuant to its Section 5 power. Under *Seminole Tribe,* the legislation must first clearly indicate that Congress intended to abrogate state immunity and second, that the abrogation must be pursuant to a valid

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the Due Process Clause in a situation where states provide their own remedy because the existence of that remedy prevents that action from being unconstitutional.

[84] This argument was put forth by the Florida Board of Regents in *Kimel. See* Respondent's Brief at 37–38, *Kimel* (No. 98-791, 98-796) (noting that "states all have laws or administrative provisions restricting age discrimination").

[85] *Kimel,* 120 S. Ct. at 650.

[86] *Id.*

[87] One interesting question that both of these approaches raise is the appropriate time for considering the laws. The former approach would likely require consideration of the laws that existed at the time that Congress enacted its legislation. Obviously, Congress would have been aware only of laws that existed when it passed its statute, and only laws existing at that time would provide evidence that the states considered the problem to exist.

It is also logical to consider only laws at the time of enactment from the latter approach. Because the existence of laws from this perspective is evidence against the need for congressional action, it would make sense to consider whether laws existed at the time of enactment in order to assess whether Congress was addressing a real problem. Furthermore, consideration of laws that exist at the time of the decision would create the possibility that Congress's power to act would be subject to a gradual phasing out, depending on actions by the state. Although this might be consistent with the Court's overall approach to the congruence and proportionality test, which depends on conditions that are subject to change, it would be an odd and perhaps even absurd result because Congress would have to take into consideration the possibility of future nullification of legislation when it enacts laws.

exercise of congressional power.[88] *Boerne* reconfirmed that Congress has the requisite power under Section 5 to abrogate state immunity when it enacts "remedial" legislation. The Court said, however, that it will apply the congruence and proportionality test to determine whether Congress is within the bounds of that power.[89]

*College Savings Bank* narrowed the scope of Section 5 to rights that are directly protected by the Fourteenth Amendment.[90] *Florida Prepaid* added further restrictions on the preventive aspect of this power and also set the bar for legislative history relatively high. Finally, *Kimel* refined the congruence and proportionality test and indicated that the Court will take a very close look at the legislative record when conducting the analysis in a situation where the constitutional protections are less strong.[91] The following sections consider the constitutionality of the EPA and the FMLA in light of these standards.

## IV. APPLICATION TO THE EPA

Every U.S. Court of Appeals that has applied the *Seminole Tribe* intent to abrogate and *Boerne* congruence and proportionality tests to the EPA has held that the EPA is a valid exercise of the Section 5 power.[92] The approach to the

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[88] In addition to refining the congruence and proportionality test, *Kimel* also appears to have expanded the boundaries of the first prong of the *Seminole Tribe* test requiring a clear statement of congressional intent to abrogate. The Eleventh Circuit determined that the ADEA was unconstitutional due to lack of a clear statement by Congress that it intended to abrogate state sovereign immunity. *See* Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426, 1430–31 (11th Cir. 1998) ("No unequivocal expression of intent to abrogate immunity is unmistakably clear in the ADEA."). *Kimel* rejected this stringent standard and found sufficient clarity in several definition provisions which include states and public agencies. The Court said that "[r]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees." *Kimel*, 120 S. Ct. at 640. Because it interpreted intent from the entire statute, rather than requiring a single explicit statement, this is arguably a more flexible standard than the Court applied in *Seminole Tribe* where it articulated the test variously as requiring "a clear legislative statement" and "unequivocally express[ed]" intent. Seminole Tribe v. Florida, 517 U.S. 44, 55–56 (1996) (citations omitted).

[89] *See supra* Part II.B (discussing the congruence and proportionality test).

[90] *See supra* Part II.C (discussing application of the congruence and proportionality test in these cases).

[91] *See supra* Part III (analyzing the use of the test to invalidate the ADEA in *Kimel*).

[92] *See* O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999) (stating that the court "join[s] every court of appeals that has decided the issue and hold[s] Congress properly abrogated the states' sovereign immunity when it enacted the EPA" (citing Anderson v. State Univ. of N.Y., 169 F.3d 117, 121 (2d Cir. 1999) (per curiam), *cert. granted*, 68 U.S.L.W. 3458 (U.S. Jan. 18, 2000) (No. 98-1846); Ussery v. Louisiana, 150 F.3d 431, 437 (5th Cir. 1998); Varner v. Ill. State Univ., 150 F.3d 706, 717 (7th Cir. 1998), *cert. granted*, 68 U.S.L.W. 928

congruence and proportionality test in *Kimel* indicates that these cases are correct because the heightened scrutiny applied to gender should give Congress significantly more power to act under Section 5. An analysis of the reasons the Act is valid under Section 5 helps to illustrate the application of these tests in the context of the intermediate scrutiny standard that the Court has developed for gender. Analysis of the EPA also serves as a prelude to a discussion of the FMLA that also arguably involves intermediate scrutiny but is a less clear case under the congruence and proportionality test.

### A. *Intent to Abrogate Sovereign Immunity*

Courts that have considered this question have all held that the 1974 amendments to the Fair Labor Standards Act (FLSA)—of which the EPA is a part[93]—that changed the definition of "employer" and "employee" to include public agencies and public employees were sufficient to meet the *Seminole Tribe* standard of clear intent. *Kimel* held that the ADEA, which incorporates the FLSA definitions, met the *Seminole Tribe* standard, and therefore the Court has implicitly approved this analysis.

### B. *Legislative History of the EPA*

The legislative history of the EPA is extremely detailed and documents the widespread existence of sex discrimination in wages.[94] Despite this extensive documentation of gender discrimination, one potential difficulty with the EPA's legislative record is that the 1974 amendments to the FLSA, which changed the definitions to apply the provisions to the states, do not contain any specific findings of sex discrimination in public entities.[95] This is precisely the problem

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(U.S. Jan. 18, 2000) (No. 98-1117); Timmer v. Mich. Dep't of Commerce, 104 F.3d 833, 842 (6th Cir. 1997)).

[93] *See Varner*, 150 F.3d at 709. *Varner* explains that the EPA, 29 U.S.C. § 206, was passed in 1963 as an amendment to the Fair Labor Standards Act of 1938 (FLSA), 2 U.S.C. § 60k. *See id.* In 1974, Congress amended the FLSA in response to the Supreme Court's decision in *Employees v. Department of Public Health & Welfare*, 411 U.S. 279 (1973), that the FLSA did not abrogate states' immunity from suit in federal court. *Id.* at 285.

[94] *See, e.g., Hearings on H.R. 3861 Before Subcomm. on Labor of the House Comm. on Educ. and Labor*, 88th Cong. 13–31 (1963) (statement of Esther Peterson, Asst. Sec. of Labor) (presenting detailed data on economic indicators that show a disparity in pay for women across a range of professions).

[95] *See Varner*, 150 F.3d at 714 (noting that the EPA is mentioned only once in the Senate Report accompanying the 1974 FLSA amendments and that the legislative history indicates that Congress focused primarily on the FLSA in the 1974 amendments (citing S. Rep. No. 93-690, at 6, 93d Cong., 2d Sess. 24 (1974); *Timmer*, 104 F.3d at 846 n.2 (Boggs, J., dissenting) ("[t]he items debated were primarily the minimum wage and overtime provisions."); EEOC v. Elrod, 674 F.2d 601, 605 (7th Cir. 1982) (noting that "[l]ittle legislative history exists on the ADEA

that *Kimel* identified in its analysis of the ADEA's legislative history[96] as well as one of the major problems that the Court found with respect to the RFRA in *Boerne*.[97]

The 1963 legislative record of the original Act is similarly lacking in details regarding wage scale inequities for public employees, and depending on how much emphasis the Court puts on the need for specific identification of unconstitutional conduct by the states, this may be troublesome for the EPA under the congruence and proportionality test.[98] *Kimel* expressly rejected the argument that Congress could have extrapolated from the evidence of widespread discrimination in the private sector when it extended the ADEA to the states in

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amendment... because the breadth and significance of the amendments to the FLSA overshadowed the ADEA amendment)). No lower court has directly addressed this issue in analyzing the EPA under Section 5. Instead, most have focused on the considerable examples of a general wage-scale differential identified in the legislative record. For example in *Varner*, the court noted that the purpose of the EPA was to remedy a serious "problem of employment discrimination in *private industry*" and therefore that "Congress accordingly had substantial justification to conclude that pervasive discrimination existed...." *Varner*, 150 F.3d at 716 (emphasis added) (citation omitted). This is exactly the kind of extrapolation from discrimination in the private sector that *Kimel* rejected in the context of the ADEA. *See supra* note 67 and accompanying text.

[96] *See* Kimel v. Fla. Bd. of Regents, 120 S. Ct. at 631, 649 (2000) (stating that examination of the legislative history confirms that Congress did not identify a pattern of age discrimination by the states in the 1974 extension of the ADEA).

[97] *See* City of Boerne v. Flores, 521 U.S. 507, 531 (1997) (noting the "lack of support in the legislative record" for the argument that the RFRA was aimed at unconstitutional conduct by the states).

[98] The legislative history for the 1963 Act detailed the widespread existence of discrimination in the private sector but did not address the question of discrimination by public entities. *See supra* note 94. However, both the extent and the nature of the private-sector discrimination described in the EPA legislative record is different than the ADEA record, and the Court may find this sufficient. *See infra* Parts IV.C.1–3 (discussing the effect of heightened scrutiny on the EPA and ADEA).

the same 1974 amendments,[99] and it is possible that the Court could reject the EPA's extension as similarly unfounded.[100]

## C. *Application of the Congruence and Proportionality Test*

It is unlikely, however, that the Court will invalidate the EPA based on the lack of a detailed legislative record because the EPA has a much stronger case for proportionality than either the ADEA or RFRA, and as discussed above, the Court has generally examined the legislative history in detail only when it first determines that a statute is unlikely to reach potentially unconstitutional conduct by the states.[101]

In other words, if the extent of the constitutional right involved and the legislative history are related aspects of the congruence and proportionality analysis, the lack of a detailed legislative record for the EPA should be more than offset by the fact that the EPA is dealing with a broader universe of potentially unconstitutional conduct because heightened scrutiny applies to gender. Comparison with the ADEA illustrates this point because it reveals that an insufficiently detailed legislative record is fatal in the context where heightened scrutiny does not apply.

### 1. *The Effect of Heightened Scrutiny*

*Kimel* determined that the ADEA was not a valid exercise of the Section 5 power because the Court has consistently held that states could legitimately rely

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[99] *See Kimel,* 120 S. Ct. at 649 (noting that the argument that Congress found substantial age discrimination in the private sector is "beside the point"). On the other hand, the Court also noted that it had "doubts whether the findings Congress did make with respect to the private sector *could be* extrapolated to support a finding of *unconstitutional* age discrimination in the public sector." *Id.* (first emphasis added). The Court appears to be implying in this statement that even if it were proper for Congress to extrapolate the existence of age discrimination in the public sector from findings of widespread age discrimination in the private sector, that would still not provide evidence that the states were engaged in *unconstitutional conduct* because age is not a suspect class. If this is the thrust of the Court's objection, then extrapolation from private sector discrimination in the EPA context may be possible because gender discrimination by the states would be unconstitutional.

[100] Such an approach would be consistent with the Court's searching inquiry in *Kimel.* However, I think that it is unlikely that the Court would go this far for two reasons. First, the Court has repeatedly emphasized that Congress has the power both to "remedy" and "deter" unconstitutional conduct through Section 5. *See Kimel,* 120 S. Ct. at 644 ("Congress' power 'to enforce' the [Fourteenth] Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder . . . ."). Second, gaps in the legislative record are most significant when the potential for unconstitutional conduct is minimal. *See supra* Part III.B.

[101] *See supra* Part III.B.

on age as a proxy for other factors under rational basis scrutiny.[102] The Court said that, therefore, the ADEA's prohibition on age discrimination would reach a broad range of constitutional conduct by the states.[103] The Court also rejected the argument that the exceptions provided for in the ADEA sufficiently circumscribe the scope of the statute to meet the requirements of the congruence and proportionality test.[104]

In contrast, the EPA addresses discrimination on the basis of gender, a category that the Court has consistently held is subject to heightened scrutiny.[105] *United States v. Virginia,* which held that the Virginia Military Institute's (VMI) refusal to admit women was unconstitutional, summarized the Court's "current directions for cases of official classifications based on gender":

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and rests entirely on the State.... The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.[106]

This language emphasizes the difficult burden faced by a state when gender discrimination is involved and highlights the relatively high potential that classifications based on gender are unconstitutional.

Under this heightened standard, it is far more likely that the Court will find the EPA's prohibition of wage discrimination based on gender congruent with the unconstitutional conduct it is designed to prevent, i.e., gender discrimination. Unlike age, gender can never serve as a proxy for other characteristics, and a state must always show substantial relation between its objective and the reason it is using gender as a classification.[107]

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[102] *See Kimel,* 120 S. Ct. at 647 (stating that "[o]ur Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so").

[103] *See id.* at 650 ("In light of the indiscriminate scope of the Act's substantive requirements ... we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.").

[104] *See id.* at 648 (stating that even considering the defenses permitted by the ADEA, it still creates a standard "akin ... to ... heightened scrutiny").

[105] *See infra* notes 111–13 and accompanying text (discussing the heightened scrutiny standard).

[106] 518 U.S. at 532–33 (1996) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)).

[107] *See Virginia,* 518 U.S. at 532–33 (describing the heightened scrutiny standard).

### 2. *Proportional Tailoring of the EPA*

In addition to implicating heightened scrutiny, the EPA has several exceptions that keep it proportional to the potential unconstitutional conduct it is designed to prevent. The Act provides four affirmative defenses to employers for not meeting the equal pay requirement. The pay differential can be justified "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ."[108] These exceptions limit the application of the EPA to situations where the pay differential is in fact based on gender,[109] and they are similar to the limitations on the Voting Rights Act that the Court cited approvingly in *Boerne*.[110]

### 3. *Comparison with the ADEA*

The situation of the ADEA is very similar to the EPA. The ADEA prohibits a very specific type of discrimination in the workplace. It contains several detailed exceptions to ensure that only unjustified conduct is prohibited, and the legislative record lacks detailed examples of a pattern of this discrimination by public entities. The one difference between the two statutes is that gender is entitled to heightened scrutiny while age is only subject to rational basis scrutiny. Therefore, the ADEA overstepped the bounds of congressional power under Section 5 because it prohibited too broad a swath of constitutional conduct by the states.[111]

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[108] 29 U.S.C. § 206(d)(1) (1994).

[109] *See* Anderson v. State Univ. of N.Y., 169 F.3d 117, 121 (2d Cir. 1999) (per curiam), *cert. granted*, 68 U.S.L.W. 3458 (U.S. Jan. 18, 2000) (No. 98-1845) (holding that the four affirmative defenses of the EPA ensure that it is "remedial legislation reasonably tailored to remedy intentional gender-based wage discrimination").

[110] *See* City of Boerne v. Flores, 521 U.S. 507, 533 (1997) (describing the geographical and time limitations of the Voting Rights Act and noting that they "tend to ensure Congress' means are proportionate to ends legitimate under § 5").

[111] *See* Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 650 (2000) (holding that the "indiscriminate scope" of the ADEA renders it an invalid exercise of Section 5). *Kimel* appears to be saying, in effect, that in situations where the classification used is not subject to heightened scrutiny, Congress will have very little power, if any, to reach the states under Section 5. One commentator has suggested that, despite these strict limitations, Congress may still be able to reach certain forms of intentional discrimination when rational basis applies. *See* Leonard, *supra* note 46 at 724–27. Professor Leonard analyzes the ADA under the standard established in *Boerne* for the Section 5 power and argues that the Court's application of rational basis to the classification of disabled restricts only the scope of congressional power under Section 5 and does not preclude congressional action altogether. *Id.*

### 4. *Scope of the EPA*

As discussed above, the EPA is carefully targeted with several exceptions that ensure it reaches only discrimination that is actually based on gender.[112] The one potential difficulty with the scope of the EPA is the fact that it applies a disparate impact standard for determining when an employer has discriminated on the basis of gender.[113] Several federal courts have addressed arguments that this standard renders the EPA an invalid exercise of the Section 5 power because it prohibits constitutional conduct, and the vast majority have concluded that the EPA is nevertheless valid.[114]

In concluding that the EPA standard is valid under Section 5, most lower courts have cited to the Supreme Court's statement in *Boerne* that Congress has the power to reach some constitutional conduct when using the Section 5 power to remedy genuinely unconstitutional conduct.[115] In its recent Section 5 decisions, the Court has yet to hold that a statute which reaches constitutional conduct is valid under the congruence and proportionality test. It has, however, consistently reiterated that Section 5 does permit Congress some leeway to do so.[116] The

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[112] *See supra* Part I.V.C.2 (detailing the EPA exceptions).

[113] *See* 29 U.S.C. § 206(d)(1) (1994):

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

*Id.*

[114] *See, e.g.*, Belch v. Bd. of Regents of the Univ. Sys., 27 F. Supp. 2d 1341, 1350 (M.D. Ga. 1998) (holding that the EPA meets the requirements of the congruence and proportionality test despite the disparate impact standard); Varner v. Ill. State Univ., 150 F.3d 706, 717 (7th Cir. 1998), *cert. granted*, 68 U.S.L.W. 928 (U.S. Jan. 18, 2000) (No. 98-1117) (Congress effectively abrogated state sovereign immunity despite the standard the EPA applies.). One lower court considering the FMLA, however, relied on the fact that it also employed disparate impact as an alternative ground for concluding that the Act exceeded congressional power under Section 5. *See* McGregor v. Goord, 18 F. Supp. 2d 204 (N.D.N.Y. 1998) (stating that "[i]t is well established that a claimant under the Fourteenth Amendment's Equal Protection Clause . . . must establish intentional discrimination" (internal citations omitted)).

[115] *See, e.g., Varner*, 150 F.3d at 716 (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)); Anderson v. State Univ. of N.Y., 169 F.3d 117, 121 (2d Cir. 1999), *cert. granted*, 68 U.S.L.W. 3458 (U.S. Jan. 18, 2000) (No. 98-1845) (citing *Varner*, 150 F.3d at 716 (citing *Boerne*, 521 U.S. at 518)).

[116] *See, e.g., Boerne*, 521 U.S. at 533 (stating that "[w]here, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations [like those contained in the Voting Rights Act] tend to ensure Congress' means are proportionate to ends legitimate under § 5"). This quote illustrates the point that the Court has interpreted Section 5 to at least theoretically permit even pervasive prohibition of constitutional conduct.

analysis of these courts supports the argument that the EPA is an example of Congress reaching constitutional state action through a valid exercise of the Section 5 power.[117]

Moreover, the Supreme Court has said that Title VII is a valid exercise of the Section 5 power.[118] In *Fitzpatrick v. Bitzer,* the Court held that Title VII's authorization of private suits against states was not barred by the Eleventh Amendment because Title VII was an exercise of the Section 5 power.[119] Title VII also employs a disparate impact standard, and the Court's holding in *Fitzpatrick* implies that this should not be a barrier to statutes passed under Section 5.

## V. APPLICATION TO THE FMLA

The Family and Medical Leave Act (FMLA) provides an interesting test of the Court's approach to congressional power under Section 5 because the legislative history makes it clear that Congress was attempting to address discrimination against women in the workplace. The FMLA, therefore, potentially implicates heightened scrutiny. Its scope, however, is much broader than the EPA, and its approach to eliminating discrimination is more nuanced than the strict equal treatment standard imposed by the EPA. Both of these aspects make the FMLA more problematic under the congruence and proportionality test. The FMLA, however, also has a far more extensive legislative record than the EPA that should strengthen its prospects under the test.

### A. *Intent to Abrogate*

The FMLA does not contain an explicit statement abrogating state sovereign immunity under the Eleventh Amendment; however, it does appear to contain sufficient references to state and local governments in other sections to meet the standard in *Kimel.* The Act defines "employer" to include any "public agency" as

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[117] The remaining question is whether the EPA is well within the scope of the Section 5 power or whether it represents the outer limits of what the Court will permit Congress to do under Section 5. The limited scope of the EPA combined with the fact that it deals with a classification subject to heightened scrutiny argue for the former interpretation. The Court's statement in *Boerne* gives some weight to this interpretation because there the Court focused on limitations in scope as a means for Congress to reach constitutional conduct by the states: "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Boerne,* 521 U.S. at 533. On the other hand, the Voting Rights Act also dealt with a class subject to heightened scrutiny, and the Court may have merely been pointing out that limitations are still necessary in a clear-cut case such as race.

[118] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 457 (1976) (holding that there is not an Eleventh Amendment bar to private suits for sex discrimination under Title VII).

[119] *Id.* at 456 (stating that the Eleventh Amendment is limited by Section 5).

defined in § 203(x) of Title 29.[120] Section 203(x) defines "[p]ublic agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or political subdivision of a State."[121] Additionally, the FMLA expressly provides the right to sue for damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."[122] *Kimel* held that the ADEA's incorporation of the § 203(x) definition was sufficient to show congressional intent to abrogate state sovereign immunity, and it should therefore be equally sufficient for the FMLA.[123]

### B. *The FMLA's Legislative Record*

The text of the FMLA itself contains explicit findings that "due to the nature of roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."[124] This language indicates that Congress intended the FMLA to address gender discrimination in the workplace, and therefore that the FMLA arguably addresses conduct involving heightened scrutiny. The *Kimel* Court made it clear, however, that it is unwilling to defer to congressional findings, and that it will examine the legislative record closely to determine if the problem Congress purports to address in fact exists.[125]

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[120] 29 U.S.C. § 2611(4)(A) (1994 & Supp. IV 1998).

[121] 29 U.S.C. § 203(x) (1994).

[122] 29 U.S.C. § 2617(a)(2) (1994).

[123] *See* Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 640 (2000). Several district courts have found that the FMLA did not meet the abrogation requirements. Those decisions, however, did not take into account the less stringent standard applied in *Kimel*. *See, e.g.*, Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 408, 419 (M.D. Pa. 1999) (holding that the FMLA's imposition of "substantive employment conditions" exceeded Congress's enforcement powers under Section 5); Driesse v. Fla. Bd. of Regents, 26 F. Supp. 2d 1328, 1332–34 (M.D. Fla. 1998) (holding that Congress did not use language clearly expressing intent to abrogate state immunity under the FMLA and that the FMLA exceeded Congress's enforcement powers under Section 5); McGregor v. Goord, 18 F. Supp. 2d 204, 209 (N.D.N.Y. 1998) (holding that the FMLA was not a valid exercise of Congress's Section 5 powers under Fourteenth Amendment); Thomson v. Ohio State Univ. Hosp., 5 F. Supp. 2d 574, 577 (S.D. Ohio 1998) (holding that the FMLA exceeded Congress's enforcement powers under Section 5).

[124] 29 U.S.C. § 2601(a)(5) (1994).

[125] *See Kimel*, at 648–49 (stating that examination of the ADEA's legislative history indicates that it "was an unwarranted response to a perhaps inconsequential problem"); *see also supra* Part III.A.1 (comparing the searching examination of legislative history in *Kimel* with the statement of deference in *Boerne*).

### 1. *Contextualization of the FMLA*

The legislative history of the FMLA details the existence of gender disparities in the workforce as well as the increasing difficulties that working women face as a result of the changing structure of the American family. The Senate Report accompanying the 1993 version of the bill explains that the FMLA "accommodates the important societal interest in assisting families," and then carefully places the FMLA in the context of other employment standards that Congress has enacted.[126] This is followed by a summary explaining that the FMLA is just another example of congressional action in response to changing societal needs.[127]

In addition to emphasizing that the FMLA is primarily addressed at the changes faced by women in the workforce,[128] the Senate Report's language about changing societal conditions addresses the concern that the Court expressed in *Kimel* that Congress was using Section 5 in reaction to "a perhaps inconsequential problem" and doing so without careful consideration of whether the standard was in fact warranted by societal realities.[129]

By contrast, these statements indicate that Congress was extremely careful to both detail the actual existence of the societal problem that the FMLA was addressing and to place the FMLA in a historical context of previous congressional action. Although it is unlikely that Congress in 1993 anticipated the stringent standard for legislative history that the Court would create in *Kimel,* this is precisely the kind of careful explication that the Court found lacking in the legislative history of the ADEA.[130]

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[126] S. REP. NO. 103-3 (1993).

[127] *See id.* at 4–5.

[128] The fact that the FMLA is primarily designed to address the challenges that these changes have created for women is evident throughout the legislative history. *See infra* Part V.B.2. This was explicitly recognized by the opponents of the bill who attempted to capitalize on the FMLA's focus on helping working women by arguing that the bill would in fact increase discrimination against women. *See, e.g.,* H.R. REP, 103–8, pt. 1 at 66 (1993) (Minority View on H.R. 1). The Minority clearly indicated that the bill was primarily aimed at women and that it believed women would be adversely affected by the FMLA:

> Since working women will be viewed as the most likely candidates for parental leave, hidden discrimination will occur if this bill becomes law. Women of child-bearing age will be viewed as risks, potentially disrupting operations through an untimely leave.... Unlike men, women must still constantly prove that they can handle the responsibilities of work and family at the same time. If this legislation passes, it will only reinforce the prejudices which already exist.

*Id.*

[129] *See Kimel,* 120 S. Ct. at 649 (noting that "Congress failed to identify a widespread pattern of age discrimination by the States").

[130] *Id.* (finding that the legislative record "reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age").

### 2. *Detailing the Challenges Faced by Working Women*

In addition to contextualizing the FMLA as designed to address a problem of national scope, the legislative history also details how this shift in the nature of the workforce has affected families and women in particular. In a section titled "The New Demands on Families and Workers," the Senate Report notes that "the General Accounting Office reports that, over the past 40 years, the female civilian labor force has increased by about a million workers each year" and that "the Bureau of Labor Statistics predicts that by the year 2005, the female labor force participation rate will reach 66.1 percent."[131]

After giving several more statistics showing the dramatic increase of women in the workforce, the report notes that the United States has experienced an equally dramatic change in the increase of single families and that "[d]ivorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children."[132] The report further observes that "[m]others' employment is often critical in keeping their families above the poverty line."[133]

The numerous references to women in these statistics demonstrate that the FMLA is intended to address the effect that these dramatic societal changes were having on women in particular. The report specifically states that although the loss of income due to illness has always been a problem, "such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs."[134] These statistics create a substantial basis for the FMLA finding that women are disproportionately affected in their working lives by this changing societal situation.

### 3. *Facial Neutrality of the FMLA*

One potential objection to the argument that the FMLA implicates heightened scrutiny is that the law is facially neutral and mandates leave for both men and women.[135] This neutral provision, however, is precisely the same as other statutes prohibiting discrimination such as the Equal Pay Act (EPA) and Title VII. Although the legislative history of the EPA indicates that it is intended to remedy a history of pay disparity between men and women, the language of the statute is gender-neutral.[136]

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131 *See* S. REP. NO. 103-3 at 5–7 (1993).

132 *Id.* at 6.

133 *Id.*

134 *Id.* at 7.

135 *See* 29 U.S.C. § 2612(a)(1) (1994) (providing leave for all "eligible employee[s]").

136 *See supra* Part IV.B (discussing the legislative history of the EPA).

Similarly, Title VII prohibits discrimination on the basis of sex without reference to women even though that provision was intended to address discrimination against women.[137] The FMLA, therefore, falls squarely within this pattern and uses gender-neutral language to address the changing needs of women in the workforce confronted with increased responsibilities as a result of the societal trends documented in the legislative history.

In addition, the legislative record indicates that Congress directly addressed the reasons for creating a gender-neutral standard despite the fact that the FMLA primarily addressed the disproportionate effect that these societal changes were having on women. The House Report to the 1990 version of the Act stated that the gender-neutral provision was an "important concept in the bill" because it prevented potential discrimination by employers against women:

> A law providing special protection to women or any narrowly defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women or some other category of worker provided special treatment. For example, legislation addressing the needs of pregnant women only would give employers an economic incentive to discriminate against women in hiring policies; legislation addressing the needs of all workers equally does not have this effect.[138]

## C. *Unconstitutional Conduct Addressed by the FMLA*

The FMLA's express purpose is to promote the stability and economic security of the family "in a manner . . . consistent with the Equal Protection Clause of the Fourteenth Amendment, minimize[] the potential for employment discrimination on the basis of sex" and to "promote the goal of equal employment opportunity for women and men."[139] Thus, the statute is designed expressly to prevent sex discrimination under the Fourteenth Amendment.

The initial question is whether the Court will consider this claim to warrant the heightened scrutiny it has applied to gender cases. As the discussion of the EPA demonstrated, heightened scrutiny creates more room for Congress to act under Section 5 because the universe of potential unconstitutional actions by the states is much larger.[140]

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[137] *See* 42 U.S.C. § 2000e-2(a)(1) (1994). These provisions state that it is unlawful for an employer to "discriminate against any individual . . . because of such individual's race, color, sex, or national origin." *Id.*

[138] *See* H.R. REP. 101-28, pt. 1, at 14 (1990).

[139] 29 U.S.C. § 2601(b)(4)–(b)(5) (1994).

[140] *See supra* Part IV.C.1 (discussing the effect of heightened scrutiny under the congruence and proportionality test).

As noted above, the legislative record certainly supports the assertion that, despite the gender-neutral application of the FMLA, its primary purpose is to address the needs of the increasing number of women in the workforce confronted with the escalating demands that an altered family structure has engendered.[141] The critical question is whether a failure by the states to address this changing situation for women is unconstitutional.

### 1. *Equal Protection After* United States v. Virginia

The Court's approach to gender discrimination in *United States v. Virginia* where the Court held that the Virginia Military Institute's (VMI) refusal to admit women was unconstitutional[142] provides a basis for arguing that it is unconstitutional for the states to fail to address the changing needs of women in the workforce. One commentator on *Virginia* has analyzed the case in detail and argues that the Court altered the equal protection analysis for gender to include a requirement of institutional adjustment to accommodate both the biological and social differences of women in our society.[143] Kovacic-Fleischer explains that Justice Ginsburg's opinion in *Virginia* goes beyond what the Court had done up until that point in gender discrimination, and her reasoning provides a basis for extending protection to women in other aspects of work.[144]

Kovacic-Fleischer notes the Court's explicit recognition in *Virginia* that "'[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration . . . " as evidence of its willingness to consider permitting the use of difference as a basis for determining what is "equal" under the Fourteenth Amendment.[145] In addition, the Court's use of the terms "accommodation," "adjustment," and "alteration," Kovacic-Fleischer argues, "stresses the equal results model" because these terms require taking into account differences between the sexes as a necessary component of reaching equality.[146]

Kovacic-Fleischer points specifically to *Virginia*'s recognition that VMI would have to accommodate the biological differences of women by altering its strength requirements and the social differences of women by altering its dorm structure. She says that the strength accommodation in *Virginia* invites the

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[141] *See supra* Part V.B (discussing the legislative history of the FMLA).

[142] *See* United States v. Virginia, 518 U.S. at 519 (1996) (holding that VMI's admission policy violates the Equal Protection Clause of the Fourteenth Amendment).

[143] *See* Candace Saari Kovacic-Fleischer, United States v. Virginia*'s New Gender Equal Protection Analysis with Ramifications for Pregnancy, Parenting, and Title VII,* 50 VAND. L. REV. 845, 867 (1997) (noting that "*United States v. Virginia,* however, not only requires VMI to admit capable women, but also requires that it make institutional changes to accept them").

[144] *Id.* at 866.

[145] Kovacic-Fleischer, *supra* note 143, at 864 (quoting *Virginia,* 518 U.S. at 533.).

[146] *See* Kovacic-Fleischer, *supra* note 143 at 864–65 (quoting *Virginia,* 518 U.S. at 545 ("accommodation"); 545 n.15 ("adjustment"); 551 n.19 ("alteration")).

parallel that employers should be required to accommodate pregnancy[147] and argues that the recognition of privacy differences in *Virginia* between men and women in requiring VMI to change its dorm structure supports the notion that employers should have to accommodate the social and biological realities that parenting is a primarily female function.[148]

### 2. *Applying* Virginia *to the FMLA*

This analysis can be extended to the FMLA to support the argument that the FMLA requires states to grant constitutionally mandated accommodations to women that reflect their increased participation in the workforce and the significant burdens that the changing family structure has created for them as a result. The legislative history of the FMLA amply illustrates these changing societal realities,[149] and *Virginia* arguably makes it unconstitutional for the states to refuse to accommodate the biological and social differences of women in the workforce dealing with these challenges.

The legislative history of the FMLA indicates that Congress explicitly recognized that the Act extended protections that prior anti-discrimination legislation in the bare equality model could not address. The House Report states that:

> As important as Title VII and the Pregnancy Discrimination Act have been, they do not address all of the employment related problems of pregnancy and childbirth.... Compliance with Title VII requires only that employers treat all employees equally.... If an employer denies benefits to its work force, it is in full compliance with anti-discrimination laws because it treats all employees equally. Thus, while Title VII, as amended by the Pregnancy Discrimination Act, has required that benefits and protection be provided to millions of previously unprotected women wage earners, it leaves gaps which an anti-discrimination law by its nature cannot fill. H.R. 1 is designed to fill those gaps.[150]

This statement further supports the fact that Congress was primarily concerned with countering discrimination faced by working women.

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[147] Kovacic-Fleischer, *supra* note 143 at 892. Kovacic-Fleischer notes that *Virginia* stated that inherent differences between the sexes "'remain cause for celebration'" and that "[s]ex classifications can be 'used to compensate women "for particular economic disabilities [they have] suffered" to "promot[e] equal employment opportunity," [and] to advance full development of the talent and capacities of our Nation's people.'" *Id.* (quoting *Virginia,* 518 U.S. at 533 (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam); Cal. Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 289 (1987))).

[148] *See* Kovacic-Fleischer, *supra* note 143 at 893. (stating that "[j]ust as pregnancy can be analogized to strength, parenting can be analogized to privacy").

[149] *See supra* Part V.B.

[150] H.R. REP. NO. 103-8, pt. 2, at 11 (1993).

Furthermore, despite the explicit recognition that it extended protections beyond the bare equality model of anti-discrimination, Congress located the need for this extension in a nucleus of unconstitutional conduct. Prior to the above-cited statement, the same report found that the current administration of leave benefits for federal employees was unconstitutional:

> Testifying in 1987 on the family leave available to Federal employees under current policy, Ms. Eleanor Holmes Norton, then a Professor at Georgetown Law School, found serious problems with the discretionary nature of family leave: "We would advise that this constitutes a systemic difference in provision of a job benefit that makes out a prima facie case of violation of Title VII of the 1964 Civil Rights Act."[151]

As noted above, the Court has consistently stated that Congress has the power to prohibit constitutional conduct when it passes legislation under Section 5 provided that it has identified potential or existing unconstitutional conduct that the legislation was designed to prevent.[152] The House Report makes it clear that Congress intended to address the unconstitutional discrimination occurring in the provision of existing leave policies by implementing a national minimum standard below which an employer could not fall. While this mandate may sweep within its scope some measure of constitutional conduct, it is a limited and legitimate response by Congress to ensure equal treatment in the workplace. Moreover, the Court's analysis in *Virginia* indicates that a certain level of accommodation is constitutionally mandated in the gender context, thus making the FMLA even more proportional to the unconstitutional conduct it is designed to prevent.

Both the Eleventh and the Second Circuits have left open the possibility that this analysis is correct and that the FMLA's express purpose of preventing gender discrimination may make it a valid exercise of the Section 5 power. The Eleventh Circuit held that an individual's claim under the FMLA was invalid under the Eleventh Amendment, but only because the plaintiff failed to show how taking

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[151] *Id.* (quoting 1987 House Hearing p. 32). It is important to note that while the unconstitutional conduct Congress identified here is not specifically among the states, it is in the federal government sector. This creates a stronger case for permitting Congress to find that similar problems exist at the state level for two reasons. First, the composition of the workforce is much more similar due to the similar functions and services performed by both federal and state employees. Second, unlike the private sector where leave policies are influenced to a large extent by the demands of the market, both federal and state government leave policies are insulated to a large extent from those pressures. Accordingly, while extrapolation from private sector discrimination to public sector discrimination may be impermissible, a similar extrapolation from federal to state employers is not. This, combined with the increased flexibility Congress has under heightened scrutiny, create a far stronger case for the FMLA than the ADEA.

[152] *See supra* note 10.

leave to care for herself was connected to the purpose of preventing gender discrimination in the workplace.[153] The plaintiff in *Garrett* sued for leave under a provision of the FMLA that permits an employee to take leave to care for her own serious health condition.[154]

The Eleventh Circuit noted that the plaintiff relied on the fact that the FMLA's purposes were to "prevent gender discrimination and to protect women from employment discrimination due to issues regarding pregnancy, child care, and caretaking of family members"; however, the court rejected the claim that the specific FMLA provision authorizing leave for an employee's own health condition could have "even a faint connection to this purpose."[155] Nevertheless, the court carefully limited its holding to this specific provision because it recognized that states "might well not be immune from certain other provisions of the Act" presumably because of these gender-related purposes identified by the plaintiffs.[156]

Moreover, the Second Circuit implicitly recognized the potential viability of the argument that the FMLA's anti-gender discrimination purpose may be sufficient to abrogate state sovereign immunity in *Hale v. Mann,*[157] where it invalidated the same individual leave provision as the Eleventh Circuit did in *Garrett.* Despite holding that the provision permitting medical leave for one's own condition failed the congruence and proportionality test, the court stated that "[i]t is important to note that . . . we only pass on the particular provisions at issue here."[158]

### D. *Scope of the FMLA Provisions*

This aspect of the test will also be difficult for the FMLA because the statute appears to go farther than simply remedying unconstitutional conduct in

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[153] *See* Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214, 1219–20 (11th Cir. 1999) (holding that the FMLA claim for leave to care for oneself was invalid under the second prong of *Seminole Tribe,* 517 U.S. 44 (1996), because Congress failed to detail unconstitutional conduct by the states relating to personal leave).

[154] *See id.* at 1219 (citing 29 U.S.C. § 2612(a)(1)(D) (permitting an employee to take the leave for their own serious health condition)).

[155] 193 F.3d at 1220.

[156] *Id.* at 1216.

[157] 219 F.3d 61 (2d Cir. 2000).

[158] *Id.* at 69. There are a number of federal court decisions addressing the viability of the FMLA after *Kimel.* Another court, in *Sims v. University of Cincinnati,* 2000 WL 973501 (6th Cir. July 17, 2000), held that the entire FMLA failed the congruence and proportionality test. *See Sims,* 2000 WL 973501 at 5. *Sims* failed to fully consider the broader reach that Congress has under Section 5 when it is addressing issues such as gender discrimination and also discounted the extensive legislative record compiled by Congress indicating that gender discrimination was the primary focus of the FMLA. *See Sims,* 2000 WL 973501 at 5–6.

mandating twelve weeks of leave per year.[159] The majority of lower courts that have considered the FMLA have found that it fails the congruence and proportionality test for precisely this reason.[160]

### 1. *Increased Flexibility under Heightened Scrutiny*

These lower court cases do not, however, focus on the increased flexibility that the possibility of heightened scrutiny creates under the test, particularly the accommodation requirement in *Virginia*. The accommodation requirement established in *Virginia* arguably requires that states provide sufficient leave to women in recognition of the social and biological reality that women are the primary caregivers in our society. In fact, the legislative history of the FMLA expressly recognizes this reality and lends support to this conclusion.[161] Under this analysis, the FMLA's leave requirement does not exceed the Section 5 power because it simply remedies the situation in which women are not granted the constitutionally required accommodations.

The obvious difficulty with extending the *Virginia* accommodation requirement to the FMLA is the fact that in *Virginia* the Court simply required the state to extend to women a service that it provided exclusively to men and recognized that doing so would require accommodation of the very real differences between men and women. The FMLA, however, mandates that states provide a benefit to both men and women that they may or may not have been providing already. In other words, whereas *Virginia* required the state to make accommodations as a necessary part of remedying its unconstitutional conduct, the FMLA arguably requires something more because it affirmatively imposes a requirement on the states.

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[159] *See* 29 U.S.C. § 2612(a)(1) (1994) (requiring twelve weeks of unpaid leave per year for eligible employees).

[160] *See* Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 408, 419 (M.D. Pa. 1999) (holding that the FMLA's imposition of "substantive employment conditions" exceeded Congress's enforcement powers under Section 5); Driesse v. Fla. Bd. of Regents, 26 F. Supp. 2d 1328, 1332–34 (M.D. Fla. 1998) (holding that Congress did not use language clearly expressing intent to abrogate state immunity under the FMLA and that the FMLA exceeded Congress's enforcement powers under Section 5); McGregor v. Goord, 18 F. Supp. 2d 204, 209 (N.D.N.Y. 1998) (holding that the FMLA was not a valid exercise of Congress's Section 5 powers); Thomson v. Ohio State Univ. Hosp., 5 F. Supp. 2d 574, 577 (S.D. Ohio 1998) (holding that the FMLA exceeded Congress's enforcement powers under Section 5). One court that found the FMLA valid rested on the bare fact that Congress expressly invoked both the Commerce Clause and Section 5 as alternative bases for passing the FMLA. *See, e.g.*, Biddlecome v. Univ. of Texas, 1997 WL 124220, at *3 (S.D. Tex.) (holding that the FMLA is valid because Congress expressly invoked Section 5).

[161] *See supra* Part V.B (discussing the legislative history of the FMLA).

The EPA is based on a straightforward anti-discrimination model under which discrimination is equated with difference in treatment.[162] Under this model, the central requirement is essentially a negative one: an employer is prohibited from paying different wages for the same job on the basis of gender. In contrast, the FMLA creates an affirmative requirement: employers must provide twelve weeks of leave to qualified employees. This leave requirement is qualitatively different from the prohibition of the EPA.[163]

This may not be fatal to the FMLA, however, because it is possible to conceive of the FMLA as simply remedying an existing constitutional problem in the way that states treat their employees by recognizing the social and biological differences of women. Under this reasoning, the fact that a state employs individuals means that it cannot discriminate on the basis of gender in doing so. After *Virginia,* non-discrimination includes accommodating the differences between men and women in the workforce. The FMLA enforces this accommodation requirement by mandating that states provide leave in recognition of the role of primary caregiver played by women in American society.

This model of non-discrimination recognizes that equal treatment is more complex than bare equality in work requirements and benefits. The Court's recognition of the inherent differences between men and women on both the biological and social level appears to be a development in this direction because it mandated that VMI take those differences into account as a necessary element of opening up that educational opportunity to women.[164]

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[162] For a discussion of the historical background and use of this model see Samuel Issacharoff and Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy,* 94 COLUM. L. REV. 2154, 2159 (1994) (describing the "$.59" slogan used by women's rights advocates in the 1970s as illustrative of the rationale behind this model). Issacharoff and Rosenblum note that the anti-discrimination model has historically predominated in the United States courts. By contrast, in Europe it is common for statutes to affirmatively accommodate the differing demands on men and women in the workplace. *See id.* at 2158. *See also* Kovacic-Fleischer, *supra* note 143, at 854–856. Kovacic-Fleischer refers to this model as "equal results" and says that under it "equal treatment in the face of these differences [between men and women] produces unequal results." *Id.* at 854.

[163] *See* Kovacic-Fleischer *supra* note 143, at 2189 (describing the FMLA as "[a]n alternative statutory model that seeks to provide actual benefits rather than simply to prohibit discrimination").

[164] *See* United States v. Virginia, 518 U.S. 515, 533 (1996). The Court first notes that "'[i]nherent differences' between men and women . . . remain cause for celebration" and further that "[s]ex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered . . . .'" *Id.* (alteration in original) (quoting Califano v. Webster, 430 U.S. 313, 320) (1977)) (per curium). This is an explicit recognition that statutes recognizing the different demands placed on women and men in the workforce can be constitutional. This note's premise takes this conclusion to the next logical step and argues that not only are differences potentially constitutional, failure to take them into account can be unconstitutional because it denies real equality of opportunity.

### 2. *Constitutionality of the Twelve-Week Requirement*

One further potential objection to the FMLA is that the requirement of twelve weeks of leave per year has no constitutional basis. The Court's acknowledgement in *Kimel* and other cases that Congress can prohibit certain constitutional conduct when it enacts remedial legislation under Section 5, however, gives Congress some flexibility in determining the appropriate remedy for discriminatory conduct.[165] This recognition by the Court involves a certain amount of deference to Congress as the appropriate body for determining the precise contours of the legislation necessary to remedy unconstitutional conduct by the states.[166] The twelve-week requirement is an excellent example of a situation where Congress, with its ability to engage in detailed fact-finding concerning the scope and nature of a problem, should be able to mandate a standard that does not have a direct constitutional basis.

The legislative history of the FMLA provides further support for the constitutionality of the twelve-week requirement because it shows that Congress reduced the leave requirement from a high of eighteen weeks in response to concerns that it was imposing too great a burden on employers.[167] The record indicates that Congress balanced the time necessary for parental bonding against the hardship on employers in order to reach this figure.[168] This reduction to the minimum necessary time is the kind of careful limitation that the Court in *Boerne* said that it would look for when analyzing whether congressional action is within the bounds of the Section 5 power even when it prohibits some constitutional conduct.[169]

Furthermore, Congress based the twelve weeks to some extent on empirical evidence that this period is the minimum necessary for adequate parent-child

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[165] *See* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("Constitutional violations can fall within the sweep of Congress [sic] enforcement power.").

[166] *See* Fullilove v. Klutznick, 448 U.S. 448, 502–503 (1980) (Powell, J., concurring) (stating that Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue").

[167] *See* H.R. REP. 101-28, pt. 1, at 22 (1990). This report notes that the original bill required eighteen weeks of leave and that the reduction represented a "compromise" specifically between the amount of time necessary for parental bonding and the burden on employers providing the leave. In this version of the bill the leave was reduced to a low of ten weeks. The final version added back an additional two weeks for a total of twelve weeks.

[168] *See id.*

[169] *See Boerne*, 520 U.S. at 533 ("Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.").

bonding both with a newborn and after the adoption of a child.[170] It is interesting to note that one objection raised by opponents of the FMLA was that twelve weeks was insufficient to accomplish the goal of bonding.[171] However, proponents of the bill argued that twelve weeks created the correct balance between permitting the minimum time necessary for bonding without placing too heavy a burden on employers.[172] This provides further support for the argument that Congress deliberately limited the scope of the FMLA in order to require only the minimum time necessary for remedying the hurdles faced by women in the workplace.[173]

## VI. CONCLUSION: STILL INSIDE

Despite Professor Friedman's dire prediction, the Court's decision in *Kimel* does not mean that all civil rights statutes will soon be "out the window."[174] Although *Kimel*'s analysis of congressional power under Section 5 shows that the Court will look closely at the basis on which Congress purports to act, it also indicates continued acknowledgment that Congress has significant power under Section 5 provided it carefully documents the need for remedial action. Furthermore, *Kimel* implies that the Court will require correspondingly less of Congress when it acts in an area of strong constitutional rights.

The heightened scrutiny standard that the Court applies to gender clearly indicates that Congress should have broad powers to act under Section 5 when it is addressing gender discrimination. The Equal Pay Act (EPA) is a clear example

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[170] *See* H.R. REP. 101-28, pt. 1, at 22 (1990). The report cites testimony that indicated the minimum necessary for bonding ranging from a high of four months to a low of six to eight weeks. The twelve-week requirement thus appears to be a compromise. *See also* 139 CONG. REC. H389 (daily ed. Feb. 3, 1993) (statement of Rep. Owens) (noting that the initial bill provided eighteen weeks of family leave and twenty-six weeks of disability leave).

[171] *See* 139 CONG. REC. S1006–07 (daily ed. Feb. 3, 1993) (statement by Sen. Hatch) (stating that the FMLA "fails to provide sufficient time for the bonding process between parent and child").

[172] *See supra* note 65 (discussing the "compromise" that the requirement represents).

[173] Opponents of the FMLA also argued that twelve weeks was not related to the Act's goal of providing leave to care for ill children or relatives noting that serious illnesses are not uniformly limited in time. *See* 139 CONG. REC. S1007 (stating that "it is . . . obvious that many serious illnesses do not confine themselves to 12 weeks"). This argument is further evidence that Congress was primarily concerned with offsetting the unique challenges faced by women in the workplace because the twelve weeks was linked primarily to the time necessary for bonding which is a role primarily played by women. While caregiving generally including for ill relatives also falls disproportionally on women in United States society, it is not linked biologically in the same way that childbirth and the subsequent bonding process. As noted above, the compromise of twelve weeks was also primarily dictated by the time necessary for bonding. *See supra* note 165.

[174] *See supra* note 1.

of where Congress is well within its powers under Section 5 because that Act directly remedies gender-based pay disparities using a straightforward equality model of non-discrimination. Moreover, the EPA is carefully limited in scope to ensure it reaches only pay differences that are actually based on gender.

The Family and Medical Leave Act (FMLA) is also aimed at remedying disparities affecting women in the workforce. In particular, it is designed to alleviate the disproportionate burden that working women bear as the traditional caregivers in American society. The increasing numbers of women in the workforce, especially the large number of women who are single-parent heads-of-households, are at a distinct disadvantage in their working lives because of this traditional role. The Court's decision in *Virginia* provides a basis for Congress to act not only to remedy the kind of bare inequality represented by pay disparities, but also to take into account the more subtle disadvantages that social and biological factors create for working women. The FMLA does exactly that by requiring states to provide leave that is directly linked to the core care-giving functions traditionally played by women.

The Court will almost certainly continue to look closely at civil rights statutes based on the Section 5 power.[175] Although its recent Section 5 decisions reveal a clear narrowing trend, the Court has yet to decide a case dealing with heightened scrutiny. Both the EPA and the FMLA illustrate the increased flexibility that Congress should have to address problems where heightened scrutiny is implicated.

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[175] *See supra* note 7 (discussing one ADA case scheduled for the 2000–2001 term).